INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
I. The facts as found by the Board	3
II. The Board's conclusions and order	12
III. The opinion of the court below	15
Argument	17
Conclusion	24
Appendix	26

CITATIONS

Babcock & Wilcox Co., 77 NLRB 577	24
Fontaine Converting Works, Inc., 77 NLRB 1386	24
Giboney v. *Empire Storage Co.*, 336 U. S. 490	18
Hughes v. *Superior Court*, No. 61, this Term, decided May 8, 1950	18
International Ass'n of Machinists v. *National Labor Relations Board*, 311 U. S. 72	16
International Brotherhood v. *National Labor Relations Board*, decided February 24, 1950 (C. A. 2)	18
National Labor Relations Board v. *Continental Oil Co.*, 159 F. 2d 326	17
National Labor Relations Board v. *Ford*, 170 F. 2d 735	17
National Labor Relations Board v. *Fulton Bag & Cotton Mills*, 175 F. 2d 675	17
National Labor Relations Board v. *Gate City Cotton Mills*, 167 F. 2d 647	16
National Labor Relations Board v. *LaSalle Steel Co.*, 178 F. 2d 829, certiorari denied May 29, 1950, No. 701, this Term	17, 18, 20
National Labor Relations Board v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323	20
National Labor Relations Board v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445	18, 23
National Labor Relations Board v. *Peterson*, 157 F. 2d 514, certiorari denied 330 U. S. 838	17
National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469	16, 18
Pittsburgh Steamship Company v. *National Labor Relations Board*, 180 F. 2d 731	23
Sax v. *National Labor Relations Board*, 171 F. 2d 769	17

Page

Teamsters Union v. *Hanke*, No. 309, this Term, decided May 8, 1950 18
Thomas v. *Collins*, 323 U. S. 516 18
Valley Mould & Iron Corp. v. *National Labor Relations Board*, 116 F. 2d 760, certiorari denied, 313 U. S. 590 17
Statutes:
National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*):
Section 7 26
Section 8 (1) 19, 26
Section 8 (2) 19, 26
Section 10 (a) 26
Section 10 (b) 26
Section 10 (c) 27
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. II, 141 *et seq.*):
Section 8 (a) (1) 27
Section 8 (a) (2) 28
Section 8 (c) 16, 17, 20, 21, 28
Section 10 (e) 28
Section 101 27
Miscellaneous:
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45 22
93 Cong. Rec. 4137, 6444, 6860 ..... 18, 22
H. R. 3020, 80th Cong., 1st Sess 22
H. Rep. No. 245, 80th Cong., 1st Sess., p. 23 ..... 22, 24
Labor Management News, Vol. I, No. 4, August 16, 1943 8
S. 1126, 80th Cong., 1st Sess 21
S. Rep. No. 105, 80th Cong., 1st Sess., p. 23 22

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 782

KROPP FORGE COMPANY AND KROPP FORGE AVIATION CO., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. A. 107–118)[1] is reported at 178 F. 2d 822. The findings of fact, conclusions of law, and order of the Board (B. A. 42–97) are reported at 68 NLRB 617.

[1] References to portions of the record contained in the appendices prepared by the Board and by petitioners are referred to as "B. A." and "R. A." respectively.

JURISDICTION

The Companies' petition for rehearing was denied on January 31, 1950 (R. A. 119). The decree of the court below was entered on the same day (R. A. 120–123). The petition for a writ of certiorari was filed on April 27, 1950. The jurisidiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioners urge that six questions are presented for determination by this Court (Pet. 11–12). We submit, however, that only the following question need be decided:

Whether the Board's finding that statements made by petitioners' officers and supervisory personnel to employees concerning organizational activities "went further than merely expressing an opinion as to the merits of the labor organization involved," and therefore constituted evidence of unfair labor practices, is supported by substantial evidence on the record considered as a whole.[2]

[2] As we show below (pp. 14, 16, 18–19), both the Board and the court below made it clear that if the statements in question had been found to be mere expressions of opinion not containing threats or promises of benefit, the statements would have been held protected by the First Amendment. Consequently, petitioners' question numbered 2 (a), "Does the First Amendment apply to the statements and utterances of an employer to its employees," is not properly presented. For

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 26–29.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on June 14, 1946, issued its findings of fact, conclusions of law, and order (B. A. 42–97).

I. THE FACTS AS FOUND BY THE BOARD

Kropp Forge Aviation Co. is a wholly owned subsidiary of Kropp Forge Company and has its office and principal place of business on the latter's premises in Cicero, Illinois, where both companies are engaged in the manufacture of steel forgings (B. A. 51–53; 100–101, 205–206, 263–264, 268–269, 271, 273).[3] For all purposes here relevant, both companies acted as one and

---

the same reason, petitioners' questions numbered 1 (c) and 2 (b), which rest on the assumption that the statements were found to be mere expressions of opinion, are not properly presented.

[3] References preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

will hereinafter be referred to as the Companies (B. A. 44–45, 51–53; 259–260, 266, 275–276).[4]

At the outset of organizational activities in 1939 among the Companies' employees, Plant Manager Hellstrom twice told employee Ohlson, an old employee and the leader of the organizational drive, that he wanted no organization in the plant (B. A. 54, 56; 108, 118, 187). When, notwithstanding management's expressed opposition, 90 percent of the employees signed petitions calling for the formation of some kind of a labor organization, Roy Kropp, president of the Company, summoned fifteen or twenty employees, "the key men in the shop," to a conference, at which they were told that although the Company could not stop them from organizing, these employees were to "try to make it a shop organization," restricted in membership to employees in the plant (B. A. 54–55; 104–105, 107–108, 112, 113–114, 115–117, 130, 279–281). The Company offered to permit the employees to use the plant machine shop for the purpose of holding a meeting to determine what kind of an organization they desired (B. A. 56; 118–119, 124, 131). As soon as it was announced that such a meeting would be held, the Company scheduled a party to be held at the same time and place, ascribing as the reason for the party the successful winding

[4] Petitioners in the court below and in this Court have abandoned any contention based on the fact that the two companies here involved are separate corporate entities.

up of the old year (B. A. 56–57; 105–106, 112, 113, 118–121, 137, 323). Two hours before the employee meeting was held, President Roy Kropp stopped employee Ohlson and told him that he didn't care whether the employees chose an independent organization or one affiliated with the A. F. of L., but "for the love of Pete, anything but the C. I. O." (B. A. 56; 120).

The employee meeting and the Company party proceeded as scheduled. Plant Manager Hellstrom welcomed the employees to the meeting, then left. A voice vote was taken by the employees and the majority chose to be represented by a "shop organization." Hellstrom then returned for the Company party as did two of the Company's foremen. The latter congratulated Ohlson on the employees' choice of an independent organization (B. A. 58, 43; 120–123, 129, 202–203).

Within one week after the machine shop meeting, the formal organization of the independent organization, herein referred to as the Association, was completed (B. A. 58–59; 109, 113, 115, 124). One month later, the Association submitted a proposed collective bargaining contract to the Company with a letter emphasizing the independent, unaffiliated nature of the Association, asserting its majority status, and requesting recognition as exclusive bargaining representative of the employees (B. A. 59; 109–110, 124–126, 137, 323–324). President Roy Kropp then met

with a committee from the Association, asked for proof of the Association's majority status, and was given the petitions which had been circulated at the outset of the organizational campaign (B. A. 60; 124–125, 280–281). Kropp gave the petitions only a cursory glance and returned them (B. A. 60; 125). Despite the fact that these petitions antedated the formation of the Association, that they did not specify the Association or any other organization as being the choice of the employees, and that no check was made as to the number or validity of the signatures on the petitions, the Company at once granted the Association exclusive recognition (B. A. 43, 60; 126, 212, 213). The Company did not accept the Association's proposed contract but, instead, submitted its own contract to which the Association promptly assented (B. A. 60; 111, 228). This contract was renewed annually in substantially identical terms for the next three years (B. A. 62–63, 65; 126, 166, 325–333).

For the first few years of the Association's existence membership and dues were openly solicited and collected in the plant during working hours (B. A. 64; 147, 148). Nevertheless, despite a very substantial increase in the number of employees, interest in the Association declined to the point where, during the latter half of 1942, it was found impossible to assemble a quorum of

fourteen members for an Association meeting (B. A. 64; 232, 178, 191–192, 206). Notwithstanding this obvious lack of interest in the Association, the Company, at the beginning of 1943, inaugurated a check-off system under which, at no cost to the Association, dues of fifty cents a month were regularly deducted from the wages of each employee named on a list supplied by the Association (B. A. 64; 175–176, 190–191, 240–241, 247–248).

In 1943, also, the Company, pursuant to a request of the War Production Board, organized a Labor Management Committee for the purpose of increasing war production (B. A. 65–66; 132, 136–137, 176, 179–180, 184, 214–215). The War Production Board program provided that membership on labor management committees should consist of an equal number of employer and employee representatives, the latter to be selected by the recognized union if there was one (B. A. 66). The scope of the activities of these committees was designed to comprehend the consideration and improvement of all aspects of the production process which would tend to increase the quantity and quality of the products manufactured (*ibid.*). Specifically excluded from the proposed agenda of these committees was any consideration of grievances or other collective bargaining matters; these were to be left to established labor-

888738—50——2

relations channels (*ibid.*).[5] O'Keefe, Industrial Relations Director of the Company, effectively preempted the employees' right to choose their own representatives by suggesting that the officers of the Association act as the labor representatives on the Committee (B. A. 67; 214–215). The unions representing the truck drivers and the die sinkers were ignored as were those production and maintenance employees who were not members of the Association (B. A. 67, n. 17; 167, 182, 183, 346–347). The Committee, so constituted, almost from its inception, handled not only production problems but grievances, wage increases, and numerous other matters which were properly subject to the usual processes of collective bargaining (B. A. 67–68; 141–142, 149, 176–177, 183, 187, 222). This practice continued even though the Company was aware of the impropriety of the procedure, and in the face of the fact that the truck drivers and die sinkers were concededly not represented on the Committee (B. A. 73, 74, 79; 186–187, 346–349). In addition, reports of rival union activities in the plant were discussed and appropriate action planned (B. A. 68, 69, n. 18; 103, 337–340).

[5] The facts concerning the proper function of the Labor Management Committee are undisputed, and are set forth in the August 16, 1943, issue of the Labor Management News, Vol. I, No. 4, an official publication of the War Production Board, introduced into evidence as Board Exhibit 20 (Tr. 463).

The prolonged negotiations for the 1944 agreement between the Association and the Company, and the terms of that agreement, when consummated, created considerable dissatisfaction among the employees and rival unions began actively to compete for the employees' favor (B. A. 71–72; 143–144, 165–166, 168–169, 171, 196, 333–336). The Labor Management Committee, thereupon, in May or June 1944, discussed the problem of getting more members to attend Association meetings and requested that the Company permit Association shop stewards who worked on Sunday to take time off with pay at the prevailing overtime rate to attend regular meetings of the Association (B. A. 73; 145, 150, 162–163, 171–172). The Company promptly granted this request (*ibid.*) In addition, stewards' meetings were often held on plant property and during working hours with the permission of the Company (B. A. 78; 157–158).

At least twice during this same period, at a time when rival unions were waging particularly vigorous campaigns, responsible officials of the Company inquired about and attempted to discourage these rival union activities. About the middle of June, 1944, Sweeney, who had succeeded Hellstrom as plant manager, summoned employee Areen to his office and asked him what he knew about the A. F. of L. (B. A. 75; 241–242). When Areen indicated that he was not interested, Sweeney said "Well, Dave, stick with me; you

will go places" (*ibid.*). Toward the end of the same month, employee Clinton went to Superintendent Lane and asked him for a raise. Lane countered by asking Clinton what he knew about the A. F. of L. (B. A. 77; 148–149). When Clinton stated that "there was activity within the shop," Lane retorted "We don't want the A. F. of L. in here. * * * They won't do us any good. * * * The Association could do as much for the men or more" (B. A. 77; 148–149, Tr. 241). Lane gave Clinton no specific answer as to the requested raise (*ibid.*).

On June 26, 1944, the International Union of Blacksmiths, Drop Forgers and Helpers, A. F. of L., made plans for an organizational meeting of the Company's employees to be held on June 29 (B. A. 75; 237). On the following morning, a representative of the United Automobile Workers, A. F. of L., another rival union, implemented a previous request for a bargaining conference with the Company by warning that unless such "a meeting was arranged immediately, he would shut the plant down" (B. A. 75–76; 185, 192, 230, 354). Later that morning there was an hour's work stoppage in the Company's flat die department (B. A. 76; 185, 192, 223–224, 196, 197, 219). The president of the Association was immediately summoned by the Company to explain these developments (B. A. 76; 185, 192, 223–224, 196, 197, 219). He asked permission of the Company to hold a meeting on June 29 between three and

five in the afternoon, the time for which the Blacksmiths' meeting had been scheduled, to see whether "they couldn't get this thing straightened out" (B. A. 76; 193, 197–199, 223–225). Since the shifts in the plant changed at four p. m., he also asked that in order to facilitate the meeting, the first shift be allowed to leave work an hour early and that the second shift be allowed to report to work an hour late (B. A. 76; 193, 197–199, 223–225). Both requests were granted (*ibid.*). Despite the fact that the urgency upon which this meeting was predicated—namely, the UAW's threat of a shutdown unless it was granted a bargaining conference—was dissipated on the following day when the UAW and the Company engaged in an amicable conference, the Association meeting was held as scheduled (B. A. 76–77; 146–147, 153, 164, 169–171, 186, 191, 193–194). Pursuant to Plant Manager Sweeney's instructions, the Company's supervisors told employees on the first shift that they would be excused an hour early for the Association meeting; employees reporting for work on the second shift were told of the meeting by the plant guards and were additionally informed that they would be paid for their time (B. A. 77; 152–153, 156, 159–160, 163–164, 174, 226). All employees who attended the meeting, the largest in the Association's history, were paid for the time thus spent (B. A. 77; 146–147, 157, 164, 206, 221, 153, 160, 216–217). The meeting of the

Blacksmiths' union was held in two sessions, one for each shift; it was attended by only a handful of the employees (B. A. 77–78; 160, 165–166, 235–237).

In February 1945, the Company executed a new one-year contract with the Association to be effective March 1. This new contract adopted a grievance procedure which the Company had unilaterally established several months earlier, and specifically assigned the Labor Management Committee a role in the settlement of grievances (B. A. 78–79; 103, 177–179, 310, 312–322, 352–353).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the above facts the Board concluded that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (B. A. 42–43).* The Board predicated this conclusion upon the following findings (B. A. 43–44):

> (1) When the employees were forming a labor organization, the Forge Company urged them to make it a shop organization, gave them a party designed to influence them to that end, and congratulated them when they voted to follow management's desire. (2) Subsequently when the unaffiliated Association requested exclusive recognition, the Forge Company granted the

*The later amendments to the Act made no relevant changes in these provisions.

request without proof of majority. (3) Thereafter, the Companies contributed support to the Association in various ways: by paying certain employees for the working time they spent in attendance at Association meetings; by agreeing to excuse employees during working hours to attend an Association meeting in the latter part of June 1944, when the Association appeared to be on the verge of yielding to outside unions as the employees' representative, and by advising the employees to attend the meeting and paying them for the working time so spent; by according to the Association the right of exclusive representation of the employees (including die sinkers and truck drivers not represented by the Association) in Labor Management Committee meetings which, in part, considered collective bargaining matters; by discussing plans at Labor Management Committee meetings to encourage membership in the Association and discourage rival activity, and by thereafter carrying out such plans; by granting the Association a cost-free irrevocable check-off; and by stating that the Association could do more for the employees than an outside union. (4) The Companies further assisted the Association by the statements of President Roy Kropp that he did not want the C. I. O., and Superintendent Lane that the Companies did not want the A. F. of L. and by the questioning of employees

> by Plant Manager Sweeney and Superintendent Lane about the A. F. of L.
>
> * * * * *
>
> We find, upon the entire record, that the respondents dominated and interfered with the formation and administration of, and contributed support to, the Association. We further find that by such acts, and by the statements and questions of President Roy Kropp, Plant Managers Hellstrom and Sweeney, and Superintendent Lane, the respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

The Board gave careful consideration to the Company's contention that the statements thus referred to fell within the free-speech guarantee of the Constitution because they were mere expressions of preference and contained no "threat, coercion or intimidation" (B. A. 44). The Board specifically stated that

> In the light of the [Company's] entire course of conduct and *also because the statements went further than merely expressing an opinion as to the merits of the labor organization involved, we find* * * * *that the statements were not privileged as free speech.* [Emphasis supplied] (B. A. 44).

Upon these findings the Board ordered the Company (B. A. 46–48) to cease and desist from dominating or interfering with the administra-

tion of, or giving support to the Association or any other labor organization; from recognizing the Association or any successor thereto as bargaining representative of their employees; from giving effect to their 1945 contract with the Association or to any modification, extension, or renewal thereof; and from in any manner interfering with Section 7 rights of their employees. The Board ordered the Company affirmatively to withdraw recognition from and to disestablish the Association, to discontinue the Labor-Management Committee as a medium for dealing with their employees concerning grievances and other collective bargaining matters, and to post appropriate notices of compliance with the order.

III. THE OPINION OF THE COURT BELOW

Upon the Board's petition for enforcement, the court below, on December 30, 1949, entered its decision enforcing the Board's order in full (R. A. 107–118). The court carefully reviewed the Board's findings of fact and, applying the standard of review contained in Section 10 (e) of the amended Act, concluded that those findings were supported by substantial evidence not only with respect to the acts and conduct of the Company's representatives, but also with respect to their statements (R. A. 114).

The Company contended before the court that Section 8 (c) of the amended Act, enacted after

the issuance of the Board's order but prior to its petition for enforcement, precluded enforcement of the order.[7] It argued that the utterances of its officials and supervisors were merely expressions of opinion, not containing threats or promises, which could not, by virtue of that section, be considered as constituting or being evidence of unfair labor practices. The Company further urged that the Board's decision was based *primarily* on these utterances, and that, if they were eliminated, the order could not stand.

The court below, assuming *arguendo,* as the Companies claimed, that the Board's order was based primarily on the utterances of the Company's representatives, held that the utterances were not of the character protected by Section 8 (c). The court pointed out that, in its view, even before the enactment of Section 8 (c), the employer's expressions of views or opinions were protected by the First Amendment to the Constitution, and that such expressions were not protected only when they contained threats or promises (R. A. 115).[8] The court concluded that on

[7] Section 8 (c) provides, so far as relevant here, that "The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of any unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit."

[8] The court below cited the following decisions: *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477; *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d

this state of the law, the language of Section 8 (c) "seems to us no more than a restatement of the principles embodied in the First Amendment * * *" (R. A. 117). The court rejected the Companies' contention that the statements in question were mere expressions of opinion, not containing threats or promises, and held that those statements "were properly considered by the Board as constituting, and as evidence of, unfair labor practice by the [Companies]" (R. A. 118).

ARGUMENT

1. Since the Board's hearing and decision in the instant case antedated the enactment of Section 8 (c) in 1947, we do not believe this provision applicable.[9] But in this case it is unnecessary to reach that question; we shall assume for present purposes that Section 8 (c) is applicable.

2. Section 8 (c) does not preclude the Board from taking into account statements which are

647 (C. A. 5); *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 175 F. 2d 675 (C. A. 5); *National Labor Relations Board* v. *Ford*, 170 F. 2d 735 (C. A. 6); *National Labor Relations Board* v. *Peterson*, 157 F. 2d 514 (C. A. 6), certiorari denied, 330 U. S. 838; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760 (C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *LaSalle Steel Company*, 178 F. 2d 829 (C. A. 7), certiorari denied May 29, 1950, No. 701, this Term; *Sax* v. *National Labor Relations Board*, 171 F. 2d 769 (C. A. 7); *National Labor Relations Board* v. *Continental Oil Co.*, 159 F. 2d 326 (C. A. 10).

[9] Our reasons are briefly stated in our petition for certiorari in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 732, pp. 8–9.

in fact coercive. Statements which amount to "pressure exerted vocally" by the employer are not protected either by the First Amendment or by Section 8 (c). *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Thomas* v. *Collins*, 323 U. S. 516; *National Labor Relations Board* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 447 (C. A. 9); cf. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, No. 61, this Term, decided May 8, 1950; *Teamsters Union* v. *Hanke*, No. 309, this Term, decided May 8, 1950; *International Brotherhood* v. *National Labor Relations Board*, decided February 24, 1950 (C. A. 2); *National Labor Relations Board* v. *La Salle Steel Co.*, 178 F. 2d 829 (C. A. 7), certiorari denied, May 29, 1950, No. 701, this Term. As Senator Taft specifically stated in the course of debate on the bill which became the amended Act, Section 8 (c) "has no application to statements which are acts in themselves or contain directions or instructions" (93 Cong. Rec. 6444, 6860).

3. In this case the Board specifically rejected petitioners' claim that the statements here in question were mere expressions of opinion containing no threats or promises of benefit and were therefore protected by the First Amendment and Section 8 (c). Addressing itself to this precise contention, the Board found that "In the light of the [Company's] entire course of conduct and also *because the statements went further than merely expressing an opinion as to the*

*merits of the labor organization involved * * * the statements were not privileged as free speech"* [Emphasis supplied] (*supra,* p. 14).

Petitioners' contention (Pet. 3, 4, 10, 11, 12, 17) that the statements were mere non-coercive expressions of opinion challenges only the substantiality of the evidence which supports the contrary findings of the Board, a question not warranting review by this Court. In any event, as the facts set forth in the Statement show (*supra,* pp. 3–12), and as the court below held (R. A. 114), the Board's factual determinations in this regard are amply supported by the evidence.[10] Plant Manager Hellstrom's statement, at the inception of organizational activities, that he wanted no organization in the plant; President Kropp's subsequent statement to the key employees that while the Company could not stop organizational activities completely, the employees were to "try to make it a shop organization"; and his statement to employee Ohlson that he did not want a C. I. O. union in the plant, were not expressions of opinion but were direc-

[10] It should be noted that the Board's findings that petitioners violated the Act are predicated to a large extent on acts and conduct, other than the statements, which were clearly violative of Section 8 (1) and (2). We do not agree with petitioners' claim, advanced in the court below, *supra,* p. 16, that the findings rested "primarily" on the statements. Petitioners do not now contend that these findings were invalid, but urge merely that since the conclusionary findings were based upon statements as well as upon acts, the decision may not be upheld if the impropriety of the statements is not established.

tions or instructions, which the employees were not free to ignore.[11] Cf. *National Labor Relations Board* v. *La Salle Steel Co., supra.*

Plant Manager Sweeney's statement to employee Areen, *supra,* pp. 9–10 "Dave stick with me. You will go places," clearly amounted to a promise of benefit contingent on the employee's submission to management's desires in the field of self organization, and was therefore not protected by Section 8 (c). The questioning of employees as to A. F. of L. activities by Superintendent Lane and Plant Manager Sweeney likewise was "not protected by Section 8 (c) of the Act, * * * and was an unfair labor practice." *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.,* 179 F. 2d 323, 326 (C. A. 8); see also cases cited in Brief for the National Labor Relations Board in Opposition, *LaSalle Steel Company* v. *National Labor Relations Board,* No. 701, this Term, pp. 28–29.

4. The court below held that Section 8 (c) does not require that the coercive nature of the statements be determined from their bare language, apart from the context in which they are uttered.

[11] That the employees regarded these statements as managerial directives with which they were required to comply is apparent from employee Edberg's description of the conference to which the employees were summoned. Edberg testified (B. A. 55; 107) that the Kropp Forge officials there "suggested or referred to it that they couldn't stop us in regard to organizing, but to try to make it a shop organization *which we did.*" (Italics added.)

Although, for reasons stated below, we think this unquestionably correct, the evidence and the Board's findings make it unnecessary to meet this contention in the present case. For if, as the Board found, "the statements went further than merely expressing an opinion", it is immaterial whether they are also coercive in the light of the surrounding circumstances. This would therefore not seem to be an appropriate case in which to grant certiorari in order to determine the question which petitioners seek to raise.

5. In any event, the view of the court below (R. A. 117) that Section 8 (c) does not require that utterances be "considered as isolated words cut off from the relevant circumstances and background in which they are spoken," is in accord with the terms and policy of that Section. Petitioners' contention (Pet. 18–20), that the legislative history of Section 8 (c) shows that Congress intended to preclude the Board from resorting to anything but the "express terms" of a statement to determine its coercive or non-coercive character is without merit.

Section 8 (c) does not repudiate the previous rule under which utterances were uniformly judged in the light of their immediate context.[12] The Senate bill (S. 1126), expressly authorized the Board to give consideration to "all the circumstances" in determining whether a statement

[12] See note 8, *supra*.

was coercive. However, because Congress believed that the Board had gone too far in condemning non-coercive statements solely because the employer had engaged in "severable or unrelated" unfair labor practices, this provision of the Senate Bill, which could have been construed as approving this practice, was omitted.[13] That Congress did not, however, thereby intend to preclude the Board from considering utterances in their immediate context is evidenced by the fact that the provision proposed in the House Bill (H. R. 3020, Section 8 (d) (1)), which exempted all statements except those which threatened force or economic reprisal "by [their] own terms" was not adopted. As the court below stated (R. A. 118), petitioners' view "would nullify the guarantee of employees' freedom of action and choice which Section 7 of the Act expressly provides. Congress, in enacting Section 8 (c), could not have intended that result."[14]

6. Other decisions of the courts of appeals, cited by the court below (R. A. 116–117), are in

[13] S. Rep. No. 105, 80th Cong., 1st Sess., p. 23; H. Rep. No. 245, 80th Cong., 1st Sess., p. 23; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; 93 Cong. Rec. 4137.

[14] Thus, a statement by an employer to an employee that "in my opinion it would be better for you if you did not join the union" might on its face appear to be merely a statement of opinion. But if the employer was displaying a discharge slip at the same time, or had recently discharged other employees for membership in the union, the statement would obviously be coercive.

accord with this position. There are no conflicting decisions.

In *Pittsburgh Steamship Co.* v. *National Labor Relations Board*, 180 F. 2d 731, certiorari granted, May 8, 1950, the Board had conceded that the employees' letters would not have been coercive under Section 8 (c), and contended only that that provision did not apply to cases decided before it was enacted. The Sixth Circuit was not called upon to, and did not, determine the meaning of Section 8 (c) in relation to the question raised by petitioner here.[15]

National Labor Relations Board v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (C. A. 9), in which petitioners claim (Pet. 12) the Court of Appeals for the Ninth Circuit took a contrary position, is entirely consistent with the views of the court below. In that case the court, discussing Section 8 (c), stated (at p. 448):

> We realize that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance.

[15] In the *Pittsburgh Steamship case*, the Sixth Circuit said, in the passage quoted by petitioner (180 F. 2d at 735):

"With reference to the right of free speech the legislative history shows that the amendment embodied in § 8 (c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

The Board does not question this statement of law. But the sentence quoted does not say or mean that the coercive character of words or statements cannot be determined from closely related circumstances.

> Even so, we do not find in the words used here anything which can be construed as coercive. That being so, it is our responsibility to say, as we do, that the finding of coercion through the speeches is not based upon substantial evidence.

We are aware of no decision in which any court has taken a contrary position.

The Board decisions which, petitioners claim (Pet. 12, 21), are inconsistent with the views of the court below, are distinguishable. In all but two of the cases the Board did no more than give effect to the Congressional objective, discussed above, by holding that non-coercive statements would not be deemed unfair labor practices merely because the employer had engaged in unrelated discriminatory conduct. In the remaining decisions, *Fontaine Converting Works, Inc.*, 77 N. L. R. B. 1386, and *Babcock & Wilcox Co.*, 77 N. L. R. B. 577, the Board gave effect to an additional objective disclosed by the legislative history of Section 8 (c) (S. Rep. No. 105, 80th Cong., 1st Sess., p. 23), namely, to eliminate the "compulsory audience" doctrine, and held that an employer's speech was not coercive merely because the employees had been ordered by the employer to listen to it.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a

conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Acting Assistant General Counsel,

ARNOLD ORDMAN,
Attorney,
National Labor Relations Board.

JUNE 1950.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranted in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the

Board for such purposes, shall have power to issue and cause to be served on such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. * * *

* * * * *

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141 *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. * * *

* * * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * *

"SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its mem-

ber, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1950